



## **FEDERAL TRADE COMMISSION**

### **16 CFR Parts 0 and 1**

#### **Revisions to Rules of Practice**

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is amending its rules of practice. The revised rules modernize procedures for rulemakings to define unfair or deceptive acts or practices under the FTC Act to provide for more efficient conduct of rulemaking proceedings. The Commission is also revising these rules to better reflect the agency's organizational structure and authority.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Josephine Liu, Assistant General Counsel for Legal Counsel, (202) 326-2170, or Kenny Wright, Attorney, (202) 326-2907, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580.

**SUPPLEMENTARY INFORMATION:** The Federal Trade Commission is revising the rules in part 0 and subpart B of part 1 its rules of practice, 16 CFR parts 0 and 1.

The Commission is amending part 0 to more accurately reflect the agency's current enforcement authority and organizational structure.

The amendments to part 1, subpart B will govern rulemaking proceedings under Section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57(a)(1)(B)) to define unfair or deceptive acts or practices. These amendments modernize the procedures for rulemaking proceedings under Section 18 and ensure conformance with the statutory structure for such proceedings.

The Commission is also making conforming edits to make the rule language more gender-neutral; use active voice instead of passive voice; replace ambiguous uses of “shall” with “may”, “will”, or “must” as appropriate; make nonsubstantive grammatical changes; and add and standardize citations to the U.S. Code where appropriate.

## **I. Revisions to Part 0—Organization**

The Commission is revising certain provisions in part 0 of its rules to better reflect the agency’s current enforcement authority and organizational structure.

### *§ 0.3: Hours.*

In § 0.3, the Commission is correcting outdated nomenclature: the agency’s offices outside of Washington, DC are regional offices, not field offices. The Commission is also clarifying that FTC offices are generally open from 8:30 a.m. to 5 p.m., except on Saturdays, Sundays, and legal holidays.

### *§ 0.4: Laws Administered.*

In § 0.4, the Commission is revising the listing of the various laws under which the Commission exercises enforcement and administrative authority. The Commission now enforces or administers more than 80 laws, which are listed at <https://www.ftc.gov/enforcement/statutes>. The webpage, which is updated regularly, contains summaries of the laws and links to the relevant statutory texts. Given that the webpage is more comprehensive and more useful than a static list of laws, the Commission is amending § 0.4 by deleting most items on the list and adding a cross reference to the webpage.

### *§ 0.8: The Chair.*

The Commission is amending § 0.8 to designate the Chair to serve as the Chief Presiding Officer or to designate an alternative Chief Presiding Officer for rulemaking proceedings under Section 18(a)(1)(B) of the FTC Act. As Chief Presiding Officer, the Chair will also retain authority to designate another Commissioner or another person who

is not responsible to any other official or employee of the Commission as Chief Presiding Officer. In addition, Section 0.8 is also being revised to include information about three units that report to the Office of the Chair: the Office of the Chief Privacy Officer, the Office of Equal Employment Opportunity and Workplace Inclusion, and the Office of Policy Planning.

*§ 0.9: Organization structure.*

The Commission is deleting the regional offices from the list of principal units included in § 0.9. The regional offices operate under the supervision of the Bureaus of Consumer Protection and Competition, so listing the regional offices as principal units is not an accurate description of the agency's organizational structure.

*§ 0.11: Office of the General Counsel.*

Section 0.11 is being revised to provide a more detailed description of the situations when the Office of the General Counsel (OGC) represents the Commission in court or before administrative agencies, and also to add that OGC represents the agency in employment and labor disputes.

*§ 0.12: Office of the Secretary.*

The Commission is revising § 0.12 to specify that an Acting Secretary can sign Commission orders and official correspondence in the Secretary's absence.

*§ 0.14: Office of Administrative Law Judges.*

In § 0.14, to match the changes to § 0.8, the Commission is deleting the reference to the Chief Administrative Law Judge serving as the Chief Presiding Officer. The Commission is also deleting a sentence about ALJs being appointed under the authority of the Office of Personnel Management. This sentence is no longer legally accurate after *Lucia v. SEC*, 585 U.S. \_\_\_, 138 S. Ct. 2044 (2018) and Executive Order 13843, 83 FR 32755 (2018).

*§§ 0.16 and 0.17: Bureaus of Competition and Consumer Protection.*

The Commission is revising §§ 0.16 and 0.17 to harmonize the description of the work performed by the Bureaus of Competition and Consumer Protection. Both Bureaus have similar investigative and enforcement responsibilities. The Commission is also clarifying in § 0.17 that the Bureau of Consumer Protection (BCP) may initiate civil penalty proceedings for rule violations and deleting an outdated discussion about BCP maintaining the agency's public reference facilities.

*§ 0.19: The Regional Offices.*

The Commission is updating § 0.19 to reflect the regional offices' current responsibilities and organizational structure. The new language makes clearer that the regional offices are responsible for enforcement as well as investigations. In addition, the regional offices are no longer under the general supervision of the Office of the Executive Director. Instead, they are under the general supervision of the Bureaus of Competition and Consumer Protection and clear their activities through the appropriate Bureau. Section 0.19(b) is being revised to reflect the various offices' current geographic areas of responsibility; to delete the regional offices' address information, which can quickly become outdated; and to reflect the fact that the Western Region has split into two separate regions: Western Region Los Angeles and Western Region San Francisco.

*§ 0.20: Office of International Affairs.*

The Commission is revising § 0.20 to clarify the role of the Office of International Affairs (OIA). OIA's responsibilities include handling the FTC's international antitrust and consumer protection missions in coordination and consultation with the appropriate Bureaus; cooperating with foreign authorities on investigations and enforcement; participating in the United States government interagency process to promote agency views on international issues within the FTC's mandate; coordinating staff exchanges and internships at the FTC for staff of non-U.S. competition, consumer protection, and privacy agencies; and building capacity at other agencies around the world.

## **II. Revisions to Part 1, Subpart B—Rules and Rulemaking Under Section**

### **18(a)(1)(B) of the FTC Act**

The Commission is revising part 1, subpart B of its rules to modernize the procedures governing rulemaking under Section 18(a)(1)(B) of the FTC Act, provide for efficient conduct of rulemaking proceedings, and to better reflect the requirements of the FTC Act.

#### *§ 1.11: Commencement of a rulemaking proceeding.*

The Commission is revising procedures under § 1.11 for the initiation of rulemaking proceedings under Section 18(a)(1)(B) of the FTC Act. Pursuant to these amendments, rulemaking proceedings will commence with the issuance of a notice of proposed rulemaking that will include the text of the proposed rule, a preliminary regulatory analysis and explanation of the Commission’s proposal, and an invitation for interested persons to comment. Pursuant to the requirements of the FTC Act, the Commission will afford interested persons an opportunity to request an informal hearing in response to this notice and will identify disputed issues of material fact, if any, necessary to be resolved in the rulemaking proceeding.

Interested persons who request to present their position orally in an informal hearing must file a request with the Commission after issuance of a notice of proposed rulemaking. This request must include a statement identifying the person’s interests in the proceeding and may propose additional disputed issues for resolution at the informal hearing.

#### *§ 1.12: Notices of informal hearings and designations.*

Section 18(c)(2) of the FTC Act also provides an opportunity for interested persons to submit their views on a proposed rule orally at an informal hearing. 15 U.S.C. 57a(c)(2). In § 1.12, the Commission is amending the provisions governing the conduct of such proceedings. When an informal hearing is requested or the Commission

determines in its discretion to hold one, the informal hearing will be initiated by a notice of informal hearing.

Pursuant to the amendments, the Commission will issue an initial notice of informal hearing to announce necessary details for an informal hearing, including the designation of a presiding officer, the time and place of the informal hearing, a final list of disputed issues of material fact to be resolved, and a list of persons who will make oral presentations. The initial notice of informal hearing will also invite interested persons to submit requests for cross-examination or to present rebuttal submissions.

Based upon submissions in response to the initial notice of informal hearing, the Commission will issue a final notice of informal hearing providing a list of interested persons who will conduct cross-examination regarding disputed issues of material fact, any groups with the same or similar interests who will be required to select a representative to conduct cross-examination on behalf of the group, and any interested persons who will be permitted to make rebuttal submissions.

To provide for the efficient conduct of informal hearings, the amendments retain provisions authorizing the Commission to group persons with similar interests and require the selection of a group representative to conduct cross-examination. The amended rules preserve the authority of the presiding officer to designate group representatives if a group of interested persons is unable to agree upon a representative and to entertain requests for an individual to conduct cross-examination on select issues that affect that person's particular interest if a designated group representative would not adequately represent their interests.

*§ 1.13: Conduct of informal hearing by the presiding officer.*

The Commission is amending § 1.13 to focus on the presiding officer's powers and responsibilities for the orderly conduct of an informal hearing. The amendments provide the presiding officer with the powers necessary to conduct effective and orderly

informal hearings in rulemaking proceedings.

The amendments provide that the Commission will establish the time and location of informal hearings, select participants who shall provide oral presentations, and designate disputed issues of material fact, if any, that are to be resolved in the rulemaking proceedings. The presiding officer designated by the Commission will have the necessary powers to conduct hearings in an efficient manner, including the power to impose time limits on oral presentations and to select or modify representatives designated to conduct cross-examination. The amendments also provide that informal hearings will be limited to a total of 5 days over the course of a thirty-day period, unless Commission extends the time for conduct of a hearing upon a showing of good cause.

The amendments remove references to direct examination in informal hearings. Providing interested persons with the opportunity to present their positions orally does not require the formality of direct examination. Consistent with Section 18 of the FTC Act, the amended rules continue to allow an interested person to cross-examine those making oral presentations if appropriate and required to address disputed issues of material fact.

The amendments also remove procedures to allow the presiding officer to compel the attendance of persons, require the production of documents, or require responses to written questions. The Commission believes that these procedures are unnecessary for the conduct of effective informal hearings in rulemaking proceedings and are inconsistent with the informal nature of such proceedings.

The revisions also eliminate the requirement that Commission staff publish a staff report containing an analysis of the rulemaking record and recommendations as to the form of the final rule for public comment. Such reports are not statutorily required in rulemaking proceedings under Section 18(a)(1)(B), and the Commission believes that eliminating this requirement will provide for more efficient proceedings without

undermining the Commission's ability to formulate effective rules. The amendments also eliminate provisions providing for an additional comment period on the presiding officer's report on the rulemaking proceeding.

The proposed amendments eliminate procedures allowing interested persons to petition the Commission or to appeal rulings of the presiding officer during an informal hearing. These provisions add procedural complexity to informal hearings that are inconsistent with the informal nature of the rulemaking process. In addition, they are unnecessary given the enhanced role the Commission will play in establishing the agenda of the informal hearing and designating disputed issues, if any, for resolution at the informal hearing. Instead, the amended rules provide a separate post-hearing process for petitions seeking Commission review of any rulings by the presiding officer denying or limiting the petitioner's ability to conduct cross-examination or make rebuttal submissions.

*§ 1.18: Rulemaking record.*

Consistent with Section 18 of the FTC Act, the amended rules continue to provide that communications about the merits of a rulemaking to a Commissioner or Commissioner's advisor will be placed on the rulemaking record. The Commission is revising § 1.18 to remove unnecessary language distinguishing between oral communications received during the comment period and those received following the close of the comment period on a proposed rule. The amendments require that a Commissioner's advisor will ensure that any oral communications to a Commissioner or Commissioner's advisor during a rulemaking proceeding will be placed on the rulemaking record through either a transcript of the communication or a memorandum that summarizes the meeting, including a list of all persons attending and a summary of all data and arguments presented. In addition, the amendments clarify the treatment of written communications to a Commissioner or their staff during the rulemaking



proceeding. The amended rules provide that written communications received during a time period designated for acceptance of written comments or submissions will be placed on the rulemaking record, while written communications received outside these designated periods will be placed on the public record unless the Commission votes to place them on the rulemaking record. The amendments also provide that communications from Members of Congress will be placed on the rulemaking record if received during the time period for comments and on the public record if received following the time period for public comment.

### III. Global Revisions

The Commission is also making various changes throughout parts 0 and 1 to:

- Reflect that Commission rulemaking notices in proceedings under Section 18(a)(1)(B) of the FTC Act must be submitted to the Committee on Energy and Commerce of the House of Representatives;
- Make the rule language more gender-neutral;<sup>1</sup>
- Use active voice instead of passive voice;
- Replace ambiguous uses of “shall” with “may”, “will”, or “must” as appropriate;
- Make nonsubstantive grammatical changes; and

---

<sup>1</sup> In particular, the Commission is revising the rules to eliminate the use of *he*, *him*, or *his* as default pronouns. This change conforms with the recommendations of numerous style manuals. See, e.g., Lauren Easton, *Making a Case for a Singular “They,”* The Definitive Source (Mar. 24, 2017), <https://blog.ap.org/products-and-services/making-a-case-for-a-singular-they> (discussing the following addition to the AP Stylebook: “*They/them/their* is acceptable in limited cases as a singular and-or gender-neutral pronoun, when alternative wording is overly awkward or clumsy.”); Chicago Style for the Singular *They* (Apr. 3, 2017), <http://cmosshoptalk.com/2017/04/03/chicago-style-for-the-singular-they/> (noting that the seventeenth edition of the Chicago Manual of Style does not prohibit the use of singular *they* as a substitute for the generic *he* in formal writing, but recommends avoiding it and offers various other ways to achieve bias-free language); Bill Walsh, *The Post Drops the “Mike” – and the Hyphen in “E-mail”*, Wash. Post (Dec. 4, 2015), [https://www.washingtonpost.com/opinions/the-post-drops-the-mike--and-the-hyphen-in-e-mail/2015/12/04/ccd6e33a-98fa-11e5-8917-653b65c809eb\\_story.html](https://www.washingtonpost.com/opinions/the-post-drops-the-mike--and-the-hyphen-in-e-mail/2015/12/04/ccd6e33a-98fa-11e5-8917-653b65c809eb_story.html) (noting that the Washington Post stylebook advises trying to write around the problem, perhaps by changing singulars to plurals, before using the singular *they* as a last resort).

- Add and standardize citations to the U.S. Code where appropriate.

#### **IV. Procedural Requirements**

The Commission has determined that this rule is exempt from the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(b), as a rule of agency organization, practice, and procedure. In addition, only substantive rules require publication 30 days prior to their effective date. 5 U.S.C. 553(d). Therefore, this final rule is effective upon publication in the Federal Register. The requirements of the Regulatory Flexibility Act also do not apply.<sup>2</sup> Further, this rule does not contain any information collection requirements as defined by the Paperwork Reduction Act of 1995 as amended. 44 U.S.C. 3501 *et seq.*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 16 CFR Part 1**

Administrative practice and procedure.

For the reasons set forth in the preamble, the Federal Trade Commission amends title 16, chapter I, subchapter A of the Code of Federal Regulations as follows:

#### **PART 0—ORGANIZATION**

1. The authority for Part 0 continues to read as follows:

**Authority:** 5 U.S.C. 552(a)(1); 15 U.S.C. 46(g).

#### **§ 0.1 [Amended]**

2. In § 0.1, remove the word “which” wherever it appears and add, in its place, the word “that”.

3. Amend § 0.2 by revising the first sentence to read as follows:

#### **§ 0.2 Official address.**

---

<sup>2</sup> A regulatory flexibility analysis under the RFA is required only when an agency must publish a notice of proposed rulemaking for comment. *See* 5 U.S.C. 603.

The principal office of the Commission is in Washington, DC. \* \* \*

4. Revise § 0.3 to read as follows:

**§ 0.3 Hours.**

Principal and regional offices are open from 8:30 a.m. to 5 p.m., except on Saturdays, Sundays, and legal holidays.

5. Revise § 0.4 to read as follows:

**§ 0.4 Laws administered.**

The Commission exercises enforcement and administrative authority under the Federal Trade Commission Act (15 U.S.C. 41-58), Clayton Act (15 U.S.C. 12-27), and more than 70 other Federal statutes, which are listed at <https://www.ftc.gov/enforcement/statutes>.

6. Revise § 0.5 to read as follows:

**§ 0.5 Laws authorizing monetary claims.**

(a) The Commission is authorized to entertain monetary claims against it under three statutes.

(1) The Federal Tort Claims Act (28 U.S.C. 2671-2680) provides that the United States will be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful acts or omissions of its employees acting within the scope of their employment or office.

(2) The Military Personnel and Civilian Employees Claims Act of 1964 (31 U.S.C. 3701, 3721) authorizes the Commission to compensate employees' claims for damage to or loss of personal property incident to their service.

(3) The Equal Access to Justice Act (5 U.S.C. 504 and 28 U.S.C. 2412) provides that an eligible prevailing party other than the United States will be awarded fees and expenses incurred in connection with any adversary adjudicative and court proceeding, unless the adjudicative officer finds that the agency was substantially justified or that

special circumstances make an award unjust.

(b) In addition, eligible parties, including certain small businesses, will be awarded fees and expenses incurred in defending against an agency demand that is substantially in excess of the final decision of the adjudicative officer and is unreasonable when compared with such decision under the facts and circumstances of the case, unless the adjudicative officer finds that the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Questions may be addressed to the Office of the General Counsel.

#### **§ 0.7 [Amended]**

7. Amend § 0.7 by:

a. In paragraph (a), adding the words “(15 U.S.C. 41 note)” after the term “1961”; and

b. In paragraph (b), removing the word “shall” and adding, in its place, the word “will”.

8. Revise § 0.8 to read as follows:

#### **§ 0.8 The Chair.**

The Chair of the Commission is designated by the President, and, subject to the general policies of the Commission, is the executive and administrative head of the agency. The Chair presides at meetings of and hearings before the Commission and participates with other Commissioners in all Commission decisions. In rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)), the Chair serves as or may designate another Commissioner to serve as the Chief Presiding Officer or may appoint another person to serve as Chief Presiding Officer who is not responsible to any other official or employee of the Commission. Attached to the Office of the Chair, and reporting directly to the Chair, and through the Chair to the Commission, are the following staff units:

(a) The Office of the Chief Privacy Officer, which ensures that the agency's practices and policies comply with applicable federal information privacy and security requirements and standards;

(b) The Office of Congressional Relations, which coordinates all liaison activities with Congress;

(c) The Office of Equal Employment Opportunity and Workplace Inclusion, which advises and assists the Chair and the organizational units in EEO policy and diversity management issues;

(d) The Office of Policy Planning, which assists the Commission to develop and implement long-range competition and consumer protection policy initiatives; and

(e) The Office of Public Affairs, which furnishes information concerning Commission activities to news media and the public.

9. Revise § 0.9 to read as follows:

**§ 0.9 Organization structure.**

The Federal Trade Commission includes the following principal units: Office of the Executive Director; Office of the General Counsel; Office of the Secretary; Office of the Inspector General; Office of Administrative Law Judges; Bureau of Competition; Bureau of Consumer Protection; Bureau of Economics; and Office of International Affairs.

**§ 0.10 [Amended]**

10. In § 0.10, in the first sentence, add a comma after the word "programs".

11. Revise § 0.11 to read as follows:

**§ 0.11 Office of the General Counsel.**

The General Counsel is the Commission's chief law officer and adviser, who renders necessary legal services to the Commission; represents the Commission in the Federal and State courts, and before administrative agencies in coordination with the Bureaus, in appellate litigation, investigative compulsory process enforcement, and defensive

litigation; advises the Commission and other agency officials and staff with respect to questions of law and policy, including advice with respect to legislative matters and ethics; represents the agency in employment and labor disputes; and responds to requests and appeals filed under the Freedom of Information and Privacy Acts and to intra- and intergovernmental information access requests.

12. Revise § 0.12 to read as follows:

**§ 0.12 Office of the Secretary.**

The Secretary is the legal custodian of the Commission's seal, property, papers, and records, including legal and public records, and is responsible for the minutes of Commission meetings. The Secretary, or in the Secretary's absence an Acting Secretary, signs Commission orders and official correspondence. In addition, the Secretary is responsible for the publication of all Commission actions that appear in the Federal Register and for the publication of Federal Trade Commission decisions.

**§ 0.13 [Amended]**

13. In § 0.13, in the second sentence, add a comma after the word "efficiency".

14. Revise § 0.14 to read as follows:

**§ 0.14 Office of Administrative Law Judges.**

Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law, to be exercised in conformity with Commission decisions and policy directives and with its Rules of Practice.

15. Revise § 0.16 to read as follows:

**§ 0.16 Bureau of Competition.**

The Bureau is responsible for enforcing Federal antitrust and trade regulation laws under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), the Clayton Act (15 U.S.C. 12-27), and a number of other special statutes that the Commission is charged

with enforcing. The Bureau carries out its responsibilities by investigating alleged law violations, recommending to the Commission such further steps as may be appropriate, and prosecuting enforcement actions authorized by the Commission. Such further steps may include seeking injunctive and other relief as permitted by statute in Federal district court; litigating before the agency's administrative law judges; negotiating settlement of complaints; and initiating rules or reports. The Bureau also conducts compliance investigations and, in compliance with Section 16(a)(1) of the FTC Act (15 U.S.C. 56(a)(1)), initiates proceedings for civil penalties to assure compliance with final Commission orders dealing with competition and trade restraint matters. The Bureau's activities also include business and consumer education and staff advice on competition laws and compliance, and liaison functions with respect to foreign antitrust and competition law enforcement agencies and organizations, including requests for international enforcement assistance.

16. Revise § 0.17 to read as follows:

**§ 0.17 Bureau of Consumer Protection.**

The Bureau is responsible for enforcing the prohibition against unfair or deceptive acts or practices in section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as well as numerous special statutes that the Commission is charged with enforcing. The Bureau carries out its responsibilities by investigating alleged law violations, recommending to the Commission such further steps as may be appropriate, and prosecuting enforcement actions authorized by the Commission. Such further steps may include seeking injunctive and other relief as permitted by statute in Federal district court; litigating before the agency's administrative law judges; negotiating settlement of complaints; initiating rules or reports; and initiating civil penalty proceedings for rule violations. The Bureau also conducts compliance investigations and, in compliance with Section 16(a)(1) of the FTC Act (15 U.S.C. 56(a)(1)), initiates proceedings for civil

penalties to assure compliance with final Commission orders dealing with unfair or deceptive practices. The Bureau participates in trade regulation rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)) and other rulemaking proceedings under statutory authority. In addition, the Bureau seeks to educate both consumers and the business community about the laws it enforces, and to assist and cooperate with other state, local, and international agencies and organizations in consumer protection enforcement and regulatory matters.

**§ 0.18 [Amended]**

17. Amend § 0.18 by,

- a. Removing the word “bureau” wherever it appears and adding, in its place, the word “Bureau”.
- b. Removing the word “bureaus” and adding, in its place, the word “Bureaus”.

18. Revise § 0.19 to read as follows:

**§ 0.19 The Regional Offices.**

(a) These offices are investigatory and enforcement arms of the Commission, and have responsibility for investigational, trial, compliance, and consumer educational activities as delegated by the Commission. They are under the general supervision of the Bureaus of Competition and Consumer Protection and clear their activities through the appropriate operating Bureau.

(b) The names and geographic areas of responsibility of the respective regional offices are as follows:

(1) Northeast Region (located in New York City, New York), covering Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Puerto Rico, and the U.S. Virgin Islands.

(2) Southeast Region (located in Atlanta, Georgia), covering Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee.



(3) East Central Region (located in Cleveland, Ohio), covering Delaware, District of Columbia, Maryland, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia.

(4) Midwest Region (located in Chicago, Illinois), covering Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin.

(5) Southwest Region (located in Dallas, Texas), covering Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.

(6) Northwest Region (located in Seattle, Washington), covering Alaska, Idaho, Montana, Oregon, Washington, and Wyoming.

(7) Western Region Los Angeles (located in Los Angeles, California), covering Arizona, Hawaii, Southern California, Southern Nevada, Guam, the Northern Mariana Islands, and American Samoa.

(8) Western Region San Francisco (located in San Francisco, California), covering Colorado, Northern California, Northern Nevada, and Utah.

(c) Each of the regional offices is supervised by a Regional Director and an Assistant Regional Director, who are available for conferences with attorneys, consumers, and other members of the public on matters relating to the Commission's activities.

19. Revise § 0.20 to read as follows:

**§ 0.20 Office of International Affairs.**

The Office of International Affairs (OIA) is responsible for the agency's international antitrust and international consumer protection missions in coordination and consultation with the appropriate Bureaus, including the design and implementation of the Commission's international program. OIA provides support to the Bureaus of Competition and Consumer Protection with regard to the international aspects of investigation and prosecution of unlawful conduct; builds cooperative relationships between the Commission and foreign authorities; cooperates with foreign authorities on

investigations and enforcement; works closely with the Bureaus to recommend agency policies to the Commission; works, through bilateral relationships, multilateral organizations, and trade fora to promote Commission priorities and policies; participates in the United States government interagency process to promote agency views on international issues within the FTC's mandate; and coordinates staff exchanges and internships at the FTC for staff of non-U.S. competition, consumer protection, and privacy agencies. OIA also assists young agencies around the world to build capacity to promote sound competition and consumer protection law enforcement.

## **PART 1—GENERAL PROCEDURES**

20. Revise the authority for subpart B of Part 1 to read as follows:

**Authority:** 15 U.S.C. 46; 15 U.S.C. 57a; 5 U.S.C. 552; 5 U.S.C. 601 note.

21. Revise § 1.7 to read as follows:

### **§ 1.7 Scope of rules in this subpart.**

The rules in this subpart apply to and govern proceedings for the promulgation of rules as provided in section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)). Such rules will be known as trade regulation rules. All other rulemaking proceedings will be governed by the rules in subpart C of this part, except as otherwise required by law or as otherwise specified in this chapter.

22. Revise § 1.8 to read as follows:

### **§ 1.8 Nature, authority, and use of trade regulation rules.**

(a) For the purpose of carrying out the provisions of the Federal Trade Commission Act, the Commission is empowered to promulgate trade regulation rules, which define with specificity acts or practices that are unfair or deceptive acts or practices in or affecting commerce. Trade regulation rules may include requirements prescribed for the purpose of preventing such acts or practices. A violation of a rule constitutes an unfair or deceptive act or practice in violation of section 5(a)(1) of that Act (15 U.S.C. 45(a)(1)),

unless the Commission otherwise expressly provides in its rule. The respondents in an adjudicative proceeding may show that the alleged conduct does not violate the rule or assert any other defense to which they are legally entitled.

(b) The Commission at any time may conduct such investigations, make such studies, and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of part 2, subpart A of this chapter.

### **§ 1.9 [Amended]**

23. In § 1.9, remove the word “shall” from wherever it appears in the section and add, in its place, the word “will”.

24. Revise § 1.10 to read as follows:

### **§ 1.10 Advance notice of proposed rulemaking.**

(a) Prior to the commencement of any trade regulation rule proceeding, the Commission must publish in the Federal Register an advance notice of such proposed proceeding.

(b) The advance notice must:

(1) Contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(2) Invite the response of interested persons with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(c) The advance notice must be submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

(d) The Commission may, in addition to publication of the advance notice, use such additional mechanisms as it considers useful to obtain suggestions regarding the content

of the area of inquiry before publication of a notice of proposed rulemaking pursuant to §1.11.

25. Revise § 1.11 to read as follows:

**§ 1.11 Commencement of a rulemaking proceeding.**

(a) *Notice of proposed rulemaking.* A trade regulation rule proceeding will commence with a notice of proposed rulemaking (NPRM). An NPRM will be published in the Federal Register not sooner than 30 days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

(b) *Contents of NPRM.* The NPRM will include:

- (1) A statement containing, with particularity, the text of the proposed rule, including any alternatives, which the Commission proposes to promulgate;
- (2) Reference to the legal authority under which the rule is proposed;
- (3) A statement describing the reason for the proposed rule;
- (4) An invitation to comment on the proposed rule, as provided in paragraph (d) of this section;
- (5) A list of disputed issues of material fact designated by the Commission as necessary to be resolved, if any;
- (6) An explanation of the opportunity for an informal hearing and instructions for submissions relating to such a hearing, as provided in paragraph (e) of this section; and
- (7) A statement of the manner in which the public may obtain copies of the preliminary regulatory analysis, if that analysis is not in the notice.

(c) *Preliminary regulatory analysis.* Except as otherwise provided by statute, the Commission must, when commencing a rulemaking proceeding, issue a preliminary regulatory analysis, which must contain:

- (1) A concise statement of the need for, and the objectives of, the proposed rule;

(2) A description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law;

(3) For the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule; and

(4) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.

(d) *Written comments.* The Commission will accept written submissions of data, views, and arguments on all issues of fact, law, and policy. The Commission may in its discretion provide for a separate rebuttal period following the comment period. The subject matter of any rebuttal comments must be confined to subjects and issues identified by the Commission in its notice or by other interested persons in comments and must not introduce new issues into the record. The NPRM will establish deadlines for filing written comments and for filing rebuttal comments on the proposed rule.

(e) *Opportunity for hearing.* The Commission will provide an opportunity for an informal hearing if an interested person requests to present their position orally or if the Commission in its discretion elects to hold an informal hearing. Any such request regarding an informal hearing must be submitted to the Commission no later than the close of the written comment period, including a rebuttal period, if any, and must include:

(1) A request to make an oral submission, if desired;

(2) A statement identifying the interested person's interests in the proceeding; and

(3) Any proposals to add disputed issues of material fact beyond those identified in the notice.

26. Revise § 1.12 to read as follows:

**§ 1.12 Notice of Informal Hearing and Designations.**

(a) *Initial notice of informal hearing.* If an informal hearing has been requested under § 1.11(e), a notice of informal hearing will be published in the Federal Register. The initial notice of informal hearing will include:

- (1) The designation of a presiding officer, pursuant to § 1.13(a)(1);
- (2) The time and place of the informal hearing;
- (3) A final list of disputed issues of material fact necessary to be resolved during the hearing, if any;
- (4) A list of the interested persons who will make oral presentations;
- (5) A list of the groups of interested persons determined by the Commission to have the same or similar interests in the proceeding;
- (6) An invitation to interested persons to submit requests to conduct or have conducted cross-examination or to present rebuttal submissions, pursuant to § 1.13(b)(2), if desired; and
- (7) Any other procedural rules necessary to promote the efficient and timely determination of the disputed issues to be resolved during the hearing.

(b) *Requests to conduct cross-examination or present rebuttal submissions.* Cross-examination and rebuttal submissions at an informal hearing are available only to address disputed issues of material fact necessary to be resolved. Requests for an opportunity to cross-examine or to present rebuttal submissions must be accompanied by a specific justification therefor. In determining whether to grant such requests, the presence of the following circumstances indicate that such requests should be granted:

- (1) An issue for cross-examination or the presentation of rebuttal submissions, is an issue of specific fact in contrast to legislative fact;
- (2) A full and true disclosure with respect to the issue can be achieved only through cross-examination rather than through rebuttal submissions or the presentation of additional oral submissions; and

(3) The particular cross-examination or rebuttal submission is required for the resolution of a disputed issue.

(c) *Final notice of informal hearing.* Based on requests submitted in response to the initial notice of public hearing, the Commission will publish a final notice of informal hearing in the Federal Register. The final notice of public hearing will include:

(1) A list of the interested persons who will conduct cross-examination regarding disputed issues of material fact;

(2) A list of any groups of interested persons with the same or similar interests in the proceeding who will be required to choose a single representative to conduct cross-examination on behalf of the group, as provided in paragraph (d) of this section; and

(3) A list of the interested persons who will be permitted to make rebuttal submissions regarding disputed issues of material fact.

(d) *Designation of group representatives for cross-examination.* After consideration of any submissions under § 1.11(e), the Commission will, if appropriate, identify groups of interested persons with the same or similar interests in the proceeding. The Commission may require any group of interested persons with the same or similar interests in the proceeding to select a single representative to conduct cross-examination on behalf of the group.

27. Revise § 1.13 to read as follows:

**§ 1.13 Conduct of informal hearing by the presiding officer.**

(a) *Presiding officer*—(1) *Designation.* In a trade regulation rule proceeding in which the Commission determines an informal hearing will be conducted, the initial notice of informal hearing must designate a presiding officer, who will be appointed by the Chief Presiding Officer specified in § 0.8 of this chapter.

(2) *Powers of the presiding officer.* The presiding officer is responsible for the orderly conduct of the informal hearing. The presiding officer has all powers necessary or

useful to that end, including the following:

(i) To issue any public notice that may be necessary for the orderly conduct of the informal hearing;

(ii) To modify the location, format, or time limits prescribed for the informal hearing, except that the presiding officer may not increase the time allotted for an informal hearing beyond a total of five hearing days over the course of a thirty-day period, unless the Commission, upon a showing of good cause, extends the number of days for the hearing;

(iii) To prescribe procedures or issue rulings to avoid unnecessary costs or delay, including, but not limited to, the imposition of reasonable time limits on the number and duration of oral presentations from individuals or groups with the same or similar interests in the proceeding and requirements that any cross-examination, which a person may be entitled to conduct or have conducted, be conducted by the presiding officer on behalf of that person in such a manner as the presiding officer determines to be appropriate and to be required for a full and true disclosure with respect to any issue designated for consideration in accordance with §1.13(b)(1);

(iv) To issue rulings selecting or modifying the designated representatives of groups of interested persons, as provided in paragraph (a)(3) of this section;

(v) To require that oral presentations at the informal hearing be under oath;

(vi) To require that oral presentations at the informal hearing be submitted in writing in advance of presentation; and

(viii) To rule on all requests of interested persons made during the course of the informal hearing.

(3) *Selection or modification of group representatives.* If a group of interested persons designated by the Commission under §1.12(d) to select a group representative is unable to agree upon a representative, the presiding officer may select a representative for



the group. The presiding officer may entertain requests by a member of a group of interested persons to conduct or have conducted cross-examination under paragraph (b)(2) of this section if, after good-faith effort, the person is unable to agree upon a single representative with other group members and is able to demonstrate that the group representative will not adequately represent the person's interests. If the presiding officer finds that there are substantial and relevant issues or data that will not be adequately presented by the group representative, then the presiding officer may allow that person to conduct or have conducted any appropriate cross-examination on issues affecting the person's particular interests.

(4) *Organization.* In the performance of their rulemaking functions, presiding officers are responsible to the chief presiding officer who must not be responsible to any other officer or employee of the Commission.

(5) *Ex parte communications.* Except as required for the disposition of ex parte matters as authorized by law, no presiding officer may consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(b) *Additional procedures when there are disputed issues of material fact.* If requested under §1.11(d), an informal hearing with the opportunity for oral presentations will be conducted by the presiding officer. In addition, if the Commission determines that there are disputed issues of material fact that are material and necessary to resolve, the informal hearing on such issues will be conducted in accordance with §1.13(b)(2).

(1) *Nature of issues for consideration in accordance with §1.13(b)(2)—(i) Issues that must be considered in accordance with §1.13(b)(2).* The only issues that must be designated for consideration in accordance with paragraphs (b)(2) of this section are disputed issues of fact that are determined by the Commission to be material and necessary to resolve.

(ii) *Addition or modification of issues for consideration in accordance with §1.13(b)(2).* The presiding officer may at any time on the presiding officer's own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to §1.12(a). No such petition shall be considered unless good cause is shown why any such proposed issue was not proposed pursuant to §1.11(e). In the event that new issues are designated, the presiding officer may determine whether interested persons may conduct cross-examination or present rebuttal submissions with respect to each new issue, as provided in § 1.12(b), and may select or modify group representatives for cross examination with respect to each new issue, as provided in paragraph (a)(3) of this section.

(2) *Cross-examination and the presentation of rebuttal submissions by interested persons.* The presiding officer will conduct or allow to be conducted cross-examination of oral presentations and the presentation of rebuttal submissions relevant to the disputed issues of material fact designated for consideration during the informal hearing. For that purpose, the presiding officer may require submission of written requests for presentation of questions to any person making oral presentations and will determine whether to ask such questions or any other questions. All requests for presentation of questions will be placed in the rulemaking record. The presiding officer will also allow the presentation of rebuttal submissions as appropriate and required for a full and true disclosure with respect to the disputed issues of material fact designated for consideration during the informal hearing.

(c) *Written transcript.* A verbatim transcript will be made of the informal hearing and placed in the rulemaking record.

(d) *Recommended decision.* The presiding officer will make a recommended decision based on their findings and conclusions as to all relevant and material evidence. The recommended decision will be made by the presiding officer who presided over the

informal hearing except that such recommended decision may be made by another officer if the officer who presided over the hearing is no longer available to the Commission. The recommended decision must be rendered within sixty days of the completion of the hearing. If a petition for review of a ruling by the presiding officer has been filed under paragraph (e) of this section, the recommended decision must be rendered within sixty days following the resolution of that petition or any rehearing required by the Commission. The presiding officer's recommended decision will be limited to explaining the presiding officer's proposed resolution of disputed issues of material fact.

*(e) Post-hearing review by the Commission of rulings by the presiding officer. (1)*

Within ten days of the completion of the informal hearing, any interested person may petition the Commission for review of a ruling by the presiding officer denying or limiting the petitioner's ability to conduct cross-examination or make rebuttal submissions upon a showing that the ruling precluded disclosure of a disputed material fact that was necessary for fair determination by the Commission of the rulemaking proceeding as a whole. Such petitions must not exceed eight thousand words. This word count limitation includes headings, footnotes, and quotations, but does not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, or proposed form of order. A petition hereunder will not stay the rulemaking proceeding unless the Commission so orders. All petitions filed under this paragraph will be a part of the rulemaking record.

(2) The Commission may, in its discretion, hear the appeal. Commission review, if granted, will be based on the petition and anything on the rulemaking record, without oral argument or further briefs, unless otherwise ordered by the Commission. If the Commission grants review, it will render a decision within thirty days of the announcement of its decision to review unless, upon a showing of good cause, the

Commission extends the number of days for review.

28. Revise § 1.14 to read as follows:

**§ 1.14 Promulgation.**

(a) The Commission, after review of the rulemaking record, may issue, modify, or decline to issue any rule. If the Commission wants further information or additional views of interested persons, it may withhold final action pending the receipt of such additional information or views. If it determines not to issue a rule, it may adopt and publish an explanation for not doing so.

(1) *Statement of basis and purpose.* If the Commission determines to promulgate a rule, it will adopt a statement of basis and purpose to accompany the rule, which must include:

- (i) A statement regarding the prevalence of the acts or practices treated by the rule;
- (ii) A statement as to the manner and context in which such acts or practices are unfair or deceptive; and
- (iii) A statement as to the economic effect of the rule, taking into account the effect on small businesses and consumers.

(2) *Final regulatory analysis.* Except as otherwise provided by statute, if the Commission determines to promulgate a final rule, it will issue a final regulatory analysis relating to the final rule. Each final regulatory analysis must contain:

- (i) A concise statement of the need for, and the objectives of, the final rule;
- (ii) A description of any alternatives to the final rule that were considered by the Commission;
- (iii) An analysis of the projected benefits and any adverse economic effects and any other effects of the final rule;
- (iv) An explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the

reasons the particular alternative was chosen;

(v) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues; and

(vi) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.

(3) *Small entity compliance guide*. For each rule for which the Commission must prepare a final regulatory flexibility analysis, the Commission will publish one or more guides to assist small entities in complying with the rule. Such guides will be designated as “small entity compliance guides.”

(b) If the Commission determines, upon its review of the rulemaking record, to propose a revised rule for further proceedings in accordance with this subpart, such proceedings, including the opportunity of interested persons to avail themselves of the procedures of §1.13(b)(2), will be limited to those portions of the revised rule, the subjects and issues of which were not substantially the subject of comment in response to a previous notice of proposed rulemaking.

(c) The final rule will be published in the Federal Register and will include the Statement of Basis and Purpose for the rule or provide an explanation of the manner in which the public may obtain copies of that document.

29. Revise § 1.16 to read as follows:

**§ 1.16 Petition for exemption from trade regulation rule.**

Any person to whom a rule would otherwise apply may petition the Commission for an exemption from such rule. The procedures for determining such a petition will be those of subpart C of this part.

30. Revise § 1.18 to read as follows:

**§ 1.18 Rulemaking record.**

(a) *Definition.* For purposes of these rules the term rulemaking record includes the final rule, its statement of basis and purpose, the verbatim transcripts of the informal hearing, if any, written submissions, the recommended decision of the presiding officer, any communications placed on the rulemaking record pursuant to §1.18(c), and any other information the Commission considers relevant to the rule.

(b) *Public availability.* The rulemaking record will be publicly available except when the Commission, for good cause shown, determines that it is in the public interest to allow any submission to be received in camera subject to the provisions of §4.9 of this chapter.

(c) *Communications to Commissioners and Commissioners' personal staffs—(1) Communications by outside parties.* Except as otherwise provided in this subpart or by the Commission, after the Commission votes to issue a notice of proposed rulemaking, comment on the proposed rule should be directed as provided in the notice. Communications with respect to the merits of that proceeding from any outside party to any Commissioner or Commissioner's advisor will be subject to the following treatment:

(i) *Written communications.* Written communications, including written communications from members of Congress, received within the period for acceptance of initial or rebuttal written comments or other written submissions will be placed on the rulemaking record. Written communications received outside of the time periods designated for acceptance of written comments or other written submissions will be placed on public record unless the Commission votes to place them on the rulemaking record.

(ii) *Oral communications.* Oral communications to a Commissioner or Commissioner's advisor are permitted only when advance notice of such oral communications is published by the Commission's Office of Public Affairs in its Weekly Calendar and Notice of "Sunshine" Meetings. A Commissioner's advisor will ensure

such oral communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner's advisor to whom such oral communications are made and promptly placed on the rulemaking record. Memoranda summarizing such oral communications must list all persons attending or otherwise participating in the meeting at which the oral communication was made, and summarize all data presented and arguments made during the meeting.

(iii) *Congressional communications*. The provisions of paragraph (c)(1)(ii) of this section do not apply to communications from Members of Congress. Memoranda prepared by the Commissioner or Commissioner's advisor setting forth the contents of any oral congressional communications will be placed on the public record. If the communication occurs within the comment period and is transcribed verbatim or summarized, the transcript or summary will be promptly placed on the rulemaking record. A transcript or summary of any oral communication which occurs after the time period for acceptance of written comments will be placed promptly on the public record.

(2) *Communications by certain officers, employees, and agents of the Commission*. After the Commission votes to issue a notice of proposed rulemaking, any officer, employee, or agent of the Commission with investigative or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission is prohibited from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection do not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

31. Revise § 1.19 to read as follows:

**§ 1.19 Modification of a rule by the Commission at the time of judicial review.**

If a reviewing court orders, under section 18(e)(2) of the Federal Trade Commission Act (15 U.S.C. 57a(e)(2)), further submissions and presentations on the rule, the Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations. Such modified or new rule will then be filed with the court together with an appropriate statement of basis and purpose and the return of such submissions and presentations.

32. Revise § 1.20 to read as follows:

**§ 1.20 Alternative procedures.**

If the Commission determines at the commencement of a rulemaking proceeding to employ procedures other than those established in this subpart, it may do so by announcing those procedures in the Federal Register notice commencing the rulemaking proceeding.

By direction of the Commission.

**April J. Tabor,**

*Secretary.*

**The following will not appear in the Code of Federal Regulations**

**Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan  
and Commissioner Rohit Chopra Regarding the Adoption of Revised Section 18  
Rulemaking Procedures**

The FTC’s revisions to Parts 0 and 1 of the Commission’s Rules of Practice will bring the Commission’s procedures for promulgating Trade Regulation Rules under Section 18 of the FTC Act in line with the statute’s requirements. These changes reflect the Commission’s serious appreciation of its statutory obligation to “avoid unnecessary costs or delay”<sup>1</sup> in those proceedings and our commitment to using all of our available

---

<sup>1</sup> 15 U.S.C. 57a(c)(2).



tools robustly to protect consumers from the unfair and deceptive tricks and traps they face in our modern economy.

### *I. Background.*

The mandate of the Federal Trade Commission is to address “unfair or deceptive acts or practices” and “unfair methods of competition” in or affecting commerce. In 1975, Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act<sup>2</sup> laying out specific procedures for the promulgation of “Trade Regulation Rules” to protect consumers in a dynamic and changing economic landscape. Indeed, the Commission rightfully responded to this grant of authority by initiating more than a dozen rulemakings in the few months and years after its passage.<sup>3</sup> Yet, in the intervening decades, we have nearly abandoned using Section 18 rulemaking as it was intended: to provide a participatory, dynamic process for setting out clear conduct rules for industry. The change in approach began in the early 1980s amid a broad deregulatory wave, including at the Commission. The Federal Trade Commission Improvements Act of 1980 instituted some lasting revisions around the edges of FTC rulemaking, including adding a requirement to issue an Advance Notice of Proposed Rulemaking (ANPRM) before initiating rulemaking.<sup>4</sup> However, the true and lasting changes to the FTC were self-imposed limitations through bureaucratic organization.

The FTC of the 1980s sought to radically reduce the agency’s rulemaking capacity. A fundamental part of that posture are the agency-promulgated rules of practice. Parts 0 and 1 of these rules shape Commission behavior and process for Section 18 rulemaking. The imposition of requirements beyond what Congress provided in statute

---

<sup>2</sup> Pub. L. No. 93-637, 88 Stat. 2183 (1975).

<sup>3</sup> Though few of the Trade Regulation Rules from that initial burst of Section 18 activity have survived the ensuing deregulatory backlash, many other TRRs under various FTC authorities have continued to provide important regulatory guidance on issues of public concern. Among those are: the Negative Option Rule (16 CFR part 425); the Franchise Rule (16 CFR part 436); the Business Opportunity Rule (16 CFR part 437); the Credit Practices Rule (16 CFR part 444); the Funeral Rule (16 CFR part 453); and the Eyeglass Rule (16 CFR part 456).

<sup>4</sup> Pub. L. No. 96-252, Section 8(a)(3).

has led to the widespread belief among some commentators and policymakers that Section 18 rulemaking is too difficult to address many of the unfair and deceptive practices prevalent in the economy today.

## *II. Changes to the rules of practice.*

These changes to the rules of practice realign Commission practice with our statutory requirements and remove those extraneous and onerous procedures that serve only to delay Commission business. These streamlined Section 18 rules still provide far greater transparency, process, and opportunity for the public and businesses alike to be heard than APA notice-and-comment rulemaking procedures.

These changes include providing the Commission with greater accountability and control over Section 18 rulemaking including deciding the final list of disputed material facts to be resolved, deciding who will make oral presentations to the Commission and who will cross examine or present rebuttals submissions. The chair will now either serve as or designate the Chief Presiding Officer and the Commission will ensure orderly conduct for those rulemakings. Previously, the Chief Administrative Law Judge was designated as Chief Presiding Officer in Part 0, which reinforced the myth that Section 18 rulemakings required elaborate, interminable judicial processes instead of straightforward public participation. Additionally, these streamlined provisions allow Commission to designate disputed issues of material fact earlier in the rulemaking proceeding with the issuance of the Notice of Proposed Rulemaking (NPRM) and avoid delaying proceedings with unrelated matters late in the process.

These procedures also enhance Commission transparency by requiring that records of both written and oral communications to a Commissioner or their advisors during a rulemaking proceeding will be placed in the rulemaking record and be available to the public.

The revised rules respect the underlying statutory requirements of Section 18 that

provide ample transparency and opportunity for public participation in the promulgation of Trade Regulation Rules. These requirements include: the publication of an ANPRM for comment; the advance submission of the ANPRM to our congressional oversight committees; the publication of an NPRM; the advance submission of the NPRM to the congressional committees; an informal hearing to resolve any disputed issue of material fact; and publication of a final rule accompanied by a statement of basis and purpose.<sup>5</sup> These statutory guidelines provide for substantially greater public engagement and congressional oversight than the Administrative Procedure Act, under which most federal rulemaking is conducted. The Commission's rules of practice should—and now do—adhere closely to this statutory framework.

### *III. Conclusion.*

Revitalizing the Commission's ability to issue timely Trade Regulation Rules under Section 18 will provide much needed clarity about how our century-old statute applies to contemporary economic realities and will allow the FTC to define with specificity what acts or practices are unfair or deceptive under Section 5 of the FTC Act.

Prospective trade rules will give businesses and consumers concrete guidance about their responsibilities and rights. Importantly the Commission will be able to exercise its prosecutorial discretion to seek a wide variety of relief, including redress, civil monetary penalties, reformation of contracts, and other relief, against first-time violators of Trade Regulation Rules under Section 19 of the FTC act. While rulemaking is no substitute for a permanent fix to our Section 13(b) authority to obtain monetary relief, trade rules can help ensure businesses will no longer be able to take advantage of consumers and cement their market position by engaging in practices that do people real harm until we catch them and take them to court the first time.

Self-imposed red tape has only created uncertainty and delay for the important

---

<sup>5</sup> 15 U.S.C. 57a.

business of this Commission. The imposition of those requirements decades ago was the FTC's signal to the business world that the brief era of Section 18 rulemaking had come to an end. With the adoption of these streamlined procedures we wish to signal a change in Commission practice and ambition: we intend to fulfil our mission to protect against unfair and deceptive practices in commerce and provide consumers and businesses with due process, clarity, and transparency while crafting the rules to do so.

### **Dissenting Statement of Commissioner Christine S. Wilson**

Regulations, even well-intentioned ones, impose costs that stifle innovation, raise the costs of doing business, limit consumer choice and increase the prices that consumers must pay, and ultimately undercut America's global competitiveness.<sup>1</sup> Congress empowered the FTC to issue trade regulations when it passed the Magnuson-Moss Act.<sup>2</sup> At the same time, it imposed significant procedural obligations on the Commission to cabin the agency's broad rulemaking discretion.

In the wake of the Magnuson-Moss Act, the agency engaged in a flurry of rulemaking activity that sought to regulate broad swaths of the economy.<sup>3</sup> The negative reaction from businesses and many in Congress was swift. During this period, the Washington Post famously accused the agency of attempting to be the "national nanny."<sup>4</sup> Congress found that the agency's rulemaking efforts were filled with "excessive

---

<sup>1</sup> I have issued several statements discussing this previously. See Regulatory Review of Safeguards Rule, Dissenting Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson (Mar. 5, 2019), available at [https://www.ftc.gov/system/files/documents/publicstatements/1466705/reg\\_review\\_of\\_safeguards\\_rule\\_cmr\\_phillips\\_wilson\\_dissent.pdf](https://www.ftc.gov/system/files/documents/publicstatements/1466705/reg_review_of_safeguards_rule_cmr_phillips_wilson_dissent.pdf); Notice of Proposed Rulemaking: Energy Labeling Rule, Dissenting Statement of Christine S. Wilson (Dec. 10, 2018), available at [https://www.ftc.gov/system/files/documents/publicstatements/1433166/2018-12-7\\_statement\\_of\\_c\\_wilson\\_energy\\_labeling.pdf](https://www.ftc.gov/system/files/documents/publicstatements/1433166/2018-12-7_statement_of_c_wilson_energy_labeling.pdf).

<sup>2</sup> Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183.

<sup>3</sup> I have described some of these rulemaking initiatives in recent statements. See Notice of Proposed Rulemaking for the Energy Labeling Rule, Dissenting Statement of Commissioner Christine S. Wilson (Dec. 22, 2020), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1585242/commission\\_wilson\\_dissenting\\_statement\\_energy\\_labeling\\_rule\\_final12-22-2020revd2.pdf](https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_energy_labeling_rule_final12-22-2020revd2.pdf); Advance Notice of Proposed Rulemaking for Regulatory Review of the Amplifier Rule, Concurring Statement of Commissioner Christine S. Wilson (Dec. 17, 2020), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1585038/p974222amplifierrulewilsonstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1585038/p974222amplifierrulewilsonstatement.pdf).

<sup>4</sup> The FTC as National Nanny, WASH. POST (Mar. 1, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/>.

ambiguity, confusion, and uncertainty.”<sup>5</sup> Backlash from the agency’s sweeping regulatory efforts of the late 1970s culminated in the Federal Trade Commission Improvements Act of 1980, which imposed additional procedural obligations on Section 18 rulemaking efforts.<sup>6</sup> In other words, Congress sought to cabin the agency’s discretion even more in what famed legal scholar Ernest Gellhorn characterized as “The Wages of Zealotry.”<sup>7</sup>

Considering the backlash to this agency’s earlier era of unbounded rulemaking activity, I am gravely concerned about today’s proposals to pare down procedural safeguards embedded in our rules of practice related to Section 18 rulemaking. I want to thank Commissioner Slaughter for her transparency in explaining the materials included in the Commission’s Section 18 rule proposal. Making this kind of information available to the public helps to foster the public’s understanding of our proposal and also creates an opportunity for more open dialogue. Considering the proposal outlined by Commissioner Slaughter today, I would find it constructive to discuss a number of questions.

*First, with respect to the objective management of the rulemaking process:* The role of a Presiding Officer is to oversee the fair adjudication of the hearing process and make independent recommendations to the Commission based on relevant and material evidence. During the 1970s rulemaking spree, the Presiding Officer was viewed as a puppet of agency management, leading to the perception that outcomes were biased and predetermined. To address this issue and build trust in the rulemaking process, Congress imposed obligations designed to ensure the independence of the Presiding Officer.<sup>8</sup> The Commission, heeding Congressional concerns regarding independence, required the Chief Administrative Law Judge to serve as the Chief Presiding Officer and empowered the Presiding Officers to lead the hearing process.

- In light of these Congressional concerns, why does today’s proposal move

---

<sup>5</sup> S. REP. NO. 96-500, at 3 (1979).

<sup>6</sup> Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374.

<sup>7</sup> Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, 4 REGULATION 33 (1980).

<sup>8</sup> Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374.

away from using independent ALJs as Presiding Officers? How can we avoid public perception that the Commission is politicizing the rulemaking process if the Chair appoints the Presiding Officer?

- How can we preserve the independence of the Presiding Officer if the Commission, not the Presiding Officer, decides which issues will be discussed at the hearing and which parties will be permitted to testify, conduct cross-examination, and offer rebuttal evidence?
- How can the Commission ensure we get a neutral and thorough accounting of evidence and data instead of a cherry-picked record that serves an agenda?
- Under the revised rules, the Commission, not the Presiding Officer, will determine the list of disputed issues of material facts. How can stakeholders ensure that their proposed factual disputes will be part of the rulemaking record if their input is out of step with the majority view of the Commission?

*Second, with respect to procedural limitations that impact public understanding and opportunities for input:* The rule revisions remove self-imposed restrictions I view as deliberate choices by this agency to comply not just with the letter of our Congressional mandate but the spirit of the law. Following our rulemaking spree in the 1970s, the FTC was stripped of funding, stripped of legal authorities, and required to institute new and substantial rulemaking steps to foster public trust in our trade rules.<sup>9</sup> Recognizing this agency was on the brink of being shuttered, our rules of practice adopted a number of rulemaking procedures that provided for additional public comment periods, publication of a staff report, and multiple opportunities for the public to weigh in on disputed issues of material fact. While the procedures as revised may comply with the statute as drafted, I support the FTC's existing approach that provides for robust additional public input.

- If the agency is preparing to remove discretionary steps from our

---

<sup>9</sup> *Id.* See also J. Howard Beales III, The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection, 22 J. PUB. POL'Y & MKTG. 192 (2003).

rulemaking process, are we concerned the more limited process will fail to identify unintended consequences of proposed rules, particularly those that could harm small businesses and marginalized communities?

- Is the Commission concerned that the public will view the more limited opportunities to comment on proposed rules as running counter to the democratic rationales for rulemaking my colleagues have previously espoused?

Additionally, rulemaking efforts are enhanced when the public has the input from expert staff at agencies overseeing the rulemaking process. The FTC has built transparency into our rules of practice by requiring that rulemaking staff publish a staff report containing their analysis of the rulemaking record and recommendations as to the form of the final rule. But the new rules eliminate the staff report requirement.

- Considering the value of staff reports, how will the Commission build trust in the enforcement of new trade rules without transparency into staff's recommendations?
- In what ways will the public's understanding of any final rules suffer because the Commission will no longer publish a report from expert FTC staff highlighting key issues and formulating recommendations based on the record?

The Commission's proposal to revise its rules of practice related to Section 18 rulemaking procedures is not a small adjustment enacted to improve efficiency. These changes have the potential to usher in a return to aggressive, unbounded rulemaking efforts that could transform entire industries without clear theories of law violations and empirical foundations for recommended regulatory burdens. Even as we speak, Congress is considering bills that run the gamut from giving the FTC expansive new authority and resources to eliminating the agency's jurisdiction. In the midst of so much criticism and

scrutiny from so many angles regarding so many aspects of our jurisdiction, why are we embarking on this path of revisiting an era that led to such significant constraints on our jurisdiction?

As the saying goes, if you don't acknowledge the mistakes of the past, you are doomed to repeat them. One striking example of this disregard for history can be found in the House Judiciary Committee's Majority Staff Report, which 12 different times points to railroad regulation as a model for Big Tech.<sup>10</sup> In a stunning omission, nowhere in its 450 pages or 2,500 footnotes does the report mention the fact of the bipartisan repeal of this regulatory framework because it harmed consumers and stifled innovation; neither does it mention the benefits that came from deregulation.<sup>11</sup>

There are many at the FTC who lived through the 1970s and 1980s and experienced the public and Congressional backlash during those dark days of the agency's history. There are many others who worked with and learned from those who lived through that period. Current management would be wise to seek their guidance.

[FR Doc. 2021-15313 Filed: 7/21/2021 8:45 am; Publication Date: 7/22/2021]

---

<sup>10</sup> For other reactions to the Majority Staff Report, see Christine S. Wilson, Remarks for American Bar Association Webcast, Interview with Commissioner Wilson and Barry Nigro on the House Judiciary Report, (Nov. 13 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1588040/aba\\_interview\\_with\\_commissioner\\_wilson\\_on\\_the\\_house\\_judiciary\\_report.pdf](https://www.ftc.gov/system/files/documents/public_statements/1588040/aba_interview_with_commissioner_wilson_on_the_house_judiciary_report.pdf) and Christine S. Wilson, Remarks for the 2020 Global Forum on Competition, (Dec. 7 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1589376/wilson-oecd-2020remarks.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589376/wilson-oecd-2020remarks.pdf).

<sup>11</sup> See MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 7 (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) at 380 ("In the railroad industry, for example, a congressional investigation found that the expansion of common carrier railroads into the coal market undermined independent coal producers, whose wares the railroads would deprioritize in to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce wrote that '[n]o competition can exist between two producers of a commodity when one of them has the power to prescribe both the price and output of the other.' Congress subsequently enacted a provision to prohibit railroads from transporting any goods that they had produced or in which they held an interest."); *id.* at 382 ("The 1887 Interstate Commerce Act, for example, prohibited discriminatory treatment by railroads."); *id.* at 383 ("Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers"); see also Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. ANTITRUST ENFORCEMENT 10, 12-14 (2019), <https://academic.oup.com/antitrust/article/8/1/10/564371> (discussing the benefits from dissolving the ICC).